

650 Town Center Drive, 20th Floor
 Costa Mesa, California 92626-1925
 Tel: (714) 540-1235 Fax: (714) 755-8290
 www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Brussels	New York
Chicago	Northern Virginia
Frankfurt	Orange County
Hamburg	Paris
Hong Kong	San Diego
London	San Francisco
Los Angeles	Shanghai
Milan	Silicon Valley
Moscow	Singapore
Munich	Tokyo
New Jersey	Washington, D.C.

October 23, 2006

VIA EMAIL & REGULAR MAIL

File No. 036182-0005

Gerard J. Thibeault, Executive Officer
 California Regional Water Quality Control Board
 Santa Ana Region
 3737 Main St., Suite 500
 Riverside, CA 92501

Re: Request for Regional Board to Agendize Abeyance Issue Related to a Petition
 Filed With State Water Resources Control Board, Regarding Proposed
Desalination Facility in Huntington Beach

Dear Mr. Thibeault:

As you know, on August 25, 2006 the California Regional Water Quality Control Board, Santa Ana Region ("Regional Board"), issued a permit to Poseidon Resources (Surfside) L.L.C. ("Poseidon") for discharge to the Pacific Ocean from its proposed seawater desalination facility in the City of Huntington Beach. On or about September 22, 2006, Surfrider Foundation and Orange County CoastKeeper (collectively, "petitioners") filed a petition with the State Water Resources Control Board ("State Board") challenging the permit on several substantive grounds and requesting that the State Board hold the petition in abeyance pursuant to California Code of Regulations, title 23, section 2050(d). The petitioners requested that the petition be held in abeyance until the statewide policy on Rule 316(b) is formally adopted or, alternatively, until after resolution of the appeal regarding Poseidon's plant now pending before the California Coastal Commission.

On September 28, 2006, staff counsel for the State Board issued an acknowledgement letter identifying the petition as complete and indicating that the State Board would be willing to hold the petition in abeyance for up to two years.

Petitioners' abeyance request is prejudicial to Poseidon in that, among other things, it prolongs the period of time during which petitioners' challenge to the permit may be heard, thereby delaying Poseidon from securing this important permit with finality. Poseidon therefore requests the Regional Board consider objecting to the abeyance of the petition, as the Regional

LATHAM & WATKINS LLP

Board is authorized to do under California Code of Regulations, title 23, section 2050(d)(2), which states in relevant part:

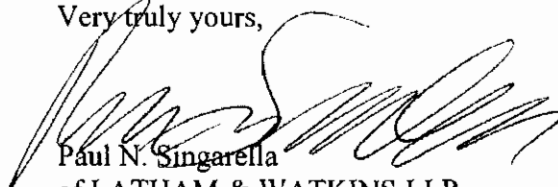
Petitions may be held in abeyance unless the Regional Board provides reasonable grounds for objection.

We believe that there are multiple reasonable grounds upon which the Regional Board can and should object to the request for abeyance. We would like an opportunity to present this issue to the Regional Board at its regularly scheduled meeting on December 1, 2006, in Irvine. We request that you place this item on the Agenda for that meeting. We plan to submit to the Regional Board our points and authorities on this issue by November 15, 2006, unless you direct us to do so at an earlier date.

The relief we are seeking is for the Regional Board to direct the Executive Officer to lodge with the State Board an objection to abeyance of the petition regarding Poseidon's permit.

We look forward to your response to our request. Should you have any questions or if we can be of any assistance whatsoever, please do not hesitate to call me at (714) 755-8168.

Very truly yours,



Paul N. Singarella
of LATHAM & WATKINS LLP

cc: Ms. Josie McKinley
Mr. Jerry King

Emily Taylor
Direct Dial: (714) 755-8087
emily.taylor@lw.com

650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Tel: (714) 540-1235 Fax: (714) 755-8290
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Brussels	New York
Chicago	Northern Virginia
Frankfurt	Orange County
Hamburg	Paris
Hong Kong	San Diego
London	San Francisco
Los Angeles	Shanghai
Milan	Silicon Valley
Moscow	Singapore
Munich	Tokyo
New Jersey	Washington, D.C.

File No. 036182-0005

November 15, 2006

VIA EMAIL

Board Members
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

Mr. Gerard Thibeault
Executive Officer
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

Re: Request that the Regional Board Object to Abeyance of the Petition Filed With the State Board Regarding the Permit for Poseidon's Huntington Beach Facility

Dear Board Members and Mr. Thibeault:

On August 25, 2006, the Santa Ana Regional Water Quality Control Board ("Regional Board") issued Order No. R8-2006-0034 (NPDES No. CA8000403) ("Permit") to Poseidon Resources (Surfside) L.L.C. ("Poseidon") for discharge to the Pacific Ocean from its Seawater Desalination Facility ("Facility"), which is proposed to be constructed in the City of Huntington Beach. On September 22, 2006, Surfrider Foundation and Orange County CoastKeeper (collectively, "Petitioners") filed a petition ("Petition") with the State Water Resources Control Board ("State Board") challenging the Permit on several grounds. Relevant to this letter, the Petition also contains a request for abeyance.

Petitioners requested the State Board to hold the Petition in abeyance until resolution of the appeal pending before the California Coastal Commission ("Coastal Commission") regarding the Facility's development plans and Environmental Impact Report or, alternatively, until adoption of the State's Clean Water Act Section 316(b) ("Section 316(b)") Policy. See Petition at 12. On September 28, 2006, the State Board issued an acknowledgment letter noting that Petitioners requested the State Board to "hold the matter in abeyance for an unspecified period of time." The State Board stated that it was "happy to do so" and that it "will hold the matter in abeyance for no more than two years from the date the [Petition] was filed."

LATHAM & WATKINS LLP

The State Board may hold petitions "in abeyance unless the Regional Board provides reasonable grounds for objection." 23 Cal. Code Regs. § 2050.5(d)(2). While requests for abeyance are often granted, in this instance there are significant reasons that the Regional Board should consider objecting to Petitioners' request for abeyance. Poseidon urges the Regional Board to file with the State Board an objection to Petitioners' request for abeyance, as the request for abeyance affronts the Regional Board's lawful permitting authority and administrative process, discourages the production of potable water from seawater in contravention of state law and policy to promote and encourage desalination, and prejudices Poseidon.

I. SUMMARY STATEMENT

Reasonable grounds exist for the Regional Board to object to the request for abeyance. The Regional Board may object to Petitioners' request for abeyance on any or all of the following reasonable grounds, or on other grounds that it deems appropriate.

First, Petitioners' reliance on Coastal Commission proceedings as a basis for abeyance affronts the Regional Board's plenary water quality authority, granted by state law and recognized by the California Supreme Court. Contrary to Petitioners' suggestion that the Coastal Commission proceedings should take precedence over the Regional Board's permitting decisions and affect the State Board's review of the Petition, the Regional Board has primary authority over water quality. Because the Coastal Commission cannot act in conflict with the Regional Board's actions related to water quality, such as the Regional Board's issuance of the Permit, the Coastal Commission's review of the Facility does not affect the Permit. Therefore, the State Board's review of the Petition, which challenges the Regional Board's issuance of a water quality permit, should not be abeyed pending Coastal Commission review.

Second, Petitioners misconstrue proper procedure for issuance of water quality permits by relying on the State Board's yet-to-be-promulgated Section 316(b) Policy as a basis for abeyance. In accordance with standard and lawful administrative practice, the Regional Board issued the Permit on the basis of regulations existing at the time of issuance. Petitioners' implication that the Regional Board acted improperly by issuing the Permit based on current law is particularly troublesome because Section 316(b) is not applicable to desalination plants such as Poseidon's. In addition, the Permit accounts for future changes in relevant regulations by allowing the Regional Board to reopen and modify the Permit under such circumstances. Accordingly, the Regional Board should object on the reasonable ground that the Petition should not be held in abeyance until adoption of the Section 316(b) Policy by the State Board.

Third, Poseidon would produce about 50 million gallons per day of potable water from approximately 100 million gallons per day of seawater in a process that is encouraged by state law. The State Board's own policy also supports and encourages the use of water reclamation, such as the conversion of seawater to potable water to be performed by Poseidon. The desalination industry, which includes entities such as Poseidon, has been working to establish desalination in California, a state in need of additional potable water sources. In accordance with state law and policy on desalination and water reclamation, the Regional Board should object to Petitioners' request for abeyance.

LATHAM & WATKINS^{LLP}

Finally, the Regional Board should object to the Permit's being held in abeyance for up to two years when Poseidon needs the Permit to facilitate financing, construction, and operation of the permitted Facility and would be prejudiced by an inability to do so, especially after having fully complied with all applicable laws and regulations to obtain the Permit. Prejudice to Poseidon caused by any long-term abeyance of the Petition may discourage the desalination industry, which will need substantial financing to make desalination a meaningful source of water supply in California.

II. THE REGIONAL BOARD HAS AUTHORITY TO OBJECT TO ABEYANCE

There is clear regulatory authority for the Regional Board to object to Petitioners' request for abeyance. The State Board may hold petitions "in abeyance unless the Regional Board provides reasonable grounds for objection." 23 Cal. Code Regs. § 2050.5(d)(2). Either the Regional Board or its Executive Officer may object to abeyance. The Executive Officer has authority to act on behalf of the Regional Board in objecting to abeyance, as such objection is not among the few enumerated powers and duties that the Regional Board may not delegate to its Executive Officer. See Cal. Water Code § 13223(a).

III. REASONABLE GROUNDS EXIST FOR THE REGIONAL BOARD TO OBJECT TO ABEYANCE

Where a Regional Board provides the State Board with "reasonable grounds for objection" to a request for abeyance, the State Board will deny the request. Such grounds exist, as discussed below.

A. The Petition Should Not Be Held in Abeyance Until the Coastal Commission Reviews the Facility, as the Regional Board Has Primary Water Quality Authority

Petitioners request that the Petition be held in abeyance until after the appeal now pending before the Coastal Commission is resolved. See Petition at 12. In making this request, Petitioners affront the Regional Board's plenary water quality authority by failing to recognize that the Coastal Commission is subordinate to the Regional Board with respect to water quality. Review of the Regional Board's issuance of a water quality permit should not be abeyed while the Coastal Commission reviews the Facility.

The Regional Board's plenary water quality authority is derived from several statutes. First, "the [State Board] and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality." Cal. Water Code § 13001. See also Cal. Pub. Res. Code § 30412(b) (same); Cal. Water Code § 13160 (designating the State Board "as the state water pollution control agency ... authorized to exercise any powers delegated to the state by the [Clean Water Act]"). These principles have been upheld by the Supreme Court of California. See Pacific Lumber Co. v. State Water Res. Control Bd., 37 Cal. 4th 921, 936 (2006) (finding "no inherent conflict" between giving the Department of Forestry final authority over a timber harvesting plan while "preserving [the State Board's and regional board's] jurisdiction over the effects of timber harvesting on state resources under their purview," such as water quality).

LATHAM & WATKINS LLP

In addition, the Coastal Commission is prohibited from "tak[ing] any action in conflict with any determination by the [State Board] or [a regional board] in matters relating to water quality." Cal. Pub. Res. Code § 30412(b). The Regional Board has taken action on a matter relating to water quality by issuing the Permit to Poseidon. Thus, any action taken by the Coastal Commission with respect to the Facility cannot be in conflict with the Permit issued by the Regional Board. Therefore, the State Board should not abey the Petition until the Coastal Commission reviews the Facility.

Accordingly, the Regional Board should object to abeyance on the reasonable ground that the Petition should not be held in abeyance pending Coastal Commission action, as the Regional Board has primary jurisdiction over water quality and the Coastal Commission cannot act in conflict with the Permit.

B. The Petition Should Not Be Held in Abeyance Until Adoption of the State's Section 316(b) Policy, as the Permit Should Be Reviewed on the Basis of Existing Laws and Regulations and Section 316(b) Is Not Applicable to Desalination Plants

Petitioners' request that the State Board hold the Petition in abeyance until adoption of the Section 316(b) Policy indicates a misinterpretation of procedure for issuance of water quality permits. The Permit, like all other permits issued by the Regional Board to dischargers, was issued "in accordance with the currently applicable federal regulations," as required. See 23 Cal. Code Regs. § 2235.2 (emphasis added). It is a fundamental principle of administrative law that a permit is issued based on currently existing law and regulations. No federal or state law, regulation, or policy requires review of the Permit to be abeyed merely because regulations may change in the future. Thus, that any law, regulation, or policy may change is not an adequate reason for the State Board to hold a petition in abeyance. To find otherwise would disrupt and frustrate the orderly proceedings and decision-making of the Regional Board. The Regional Board should protect its administrative process by objecting on this reasonable ground to abeyance.

In addition, Petitioners' implication that the Regional Board acted improperly by issuing the Permit based on current law is problematic because desalination plants such as Poseidon's are not regulated by Section 316(b). According to the State Board's Section 316(b) scoping document, desalination plants are "outside the scope of the Clean Water Act [Section] 316(b) issues and would be more appropriately addressed through the other water quality control plans."¹ State Board, Scoping Document: Proposed Statewide Policy on Clean Water Act Section 316(b) Regulations, at 28 (June 13, 2006). It would be illogical and arbitrary to abey the Petition until adoption of a policy that does not even apply to Poseidon. In addition, the Permit includes a reopener provision that allows the Regional Board to reopen the Permit for modification upon adoption of new regulations by the State Board. See Permit at F-22.

¹ A permit issued by another regional water quality control board to Poseidon's seawater desalination facility in the City of Carlsbad recognizes this, stating that it "is not subject to [Section] 316(b) regulations." Order No. R9-2006-0065 (NPDES No. CA0109223) (Aug. 16, 2006), at F-19. See also *id.* at F-49.

LATHAM & WATKINS LLP

Accordingly, Section 316(b)'s inapplicability to the Facility provides a reasonable ground upon which the Regional Board should object to Petitioners' request for abeyance.

C. The Petition Should Not Be Held in Abeyance Because Desalination Is Promoted By State Law and Policy

Desalination facilities such as Poseidon's promote California's water supply objectives. Water supply problems are particularly important in Southern California, as the region is arid and densely populated. Each day, the Facility would convert approximately 100 million gallons of seawater into about 50 million gallons of potable water for local distribution -- a significant contribution to the region's water supply. See Permit at 4.

State law promotes and encourages desalination. For example, Water Code section 12946 states that "the people of the state have a primary interest in the development of [desalination]" such as that to be performed by the Facility. In addition, Water Code section 12947(a) recognizes that "[d]esalination is consistent [both with] state water supply and [with] efficiency policy goals." See also Cal. Water Code §§ 12948-12949.6 (authorizing and encouraging the Department of Water Resources ("Department") to participate in desalination projects); *id.* § 79545 (providing at least \$50 million for grants for desalination). In addition, the Department acknowledges the need for new desalinated water supply and recognizes the Facility as an important future provider. See Department, California Water Plan Update 2005, Vol. 2 at 6-2, available at <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol2/v2ch06.pdf> (Dec. 2005). Finally, it is a State Board principle that the State Board and all regional boards "shall encourage" water reclamation projects that make "[b]eneficial use" of waters "that would otherwise be discharged to marine ... receiving waters" or that produce "[r]eclaimed water [that] will replace or supplement the use of fresh water or better quality water," such as the Facility. See State Board, Policy With Respect to Water Reclamation in California, Res. No. 77-1 (Jan. 6, 1977). Accordingly, the Facility should be encouraged by the Regional Board.

State law and policy -- including the State Board's own -- promote and encourage the use of desalinated water such as that to be provided by Poseidon. Holding the Petition in abeyance certainly would not "encourage" the use of desalination; to the contrary, it would signal to other water reclamation entities that, on the basis of a bare, unsupported request, their permits could be stalled by the State Board for years without any review of the merits. Thus, the Regional Board may object on reasonable grounds to the Petition being held in abeyance, as it would hinder production of desalinated water in contravention of state law and policy.

D. The Petition Should Not Be Held in Abeyance Because Abeyance Would Cause Material Prejudice to Poseidon, Potentially Having a Chilling Effect on the Desalination Industry

To obtain the Permit, which contains no special waivers or variances, Poseidon complied fully with applicable laws and regulations. The State Board's holding the Petition in abeyance would result in prejudice to Poseidon, as lack of resolution of the Petition would prevent finality of the Permit, despite Poseidon's full cooperation and compliance in obtaining the Permit. Many aspects of the Facility -- including financing, construction, and sale of desalinated water -- are

LATHAM & WATKINS LLP

sensitive to Poseidon's ability to secure closure of its various entitlements, including the Permit. See Affidavit of Andrew Kingman ¶ 6 (attached).

Poseidon must secure closure of the Permit to facilitate the securing of financing necessary to construct the Facility. See id. ¶ 7. Frustration of Poseidon's ability to secure financing could hinder development of the Facility, prejudicing Poseidon. See id. ¶ 8. Failure to obtain financing also could make construction contractors reluctant to start work without evidence that the Petition is resolved and the Permit is final. See id. Poseidon may be unable to adhere to its construction schedule if the Petition is not resolved timely, potentially resulting in damages and other contractual issues. See id. ¶ 9.

The Petition must be resolved and the Permit must be final for Poseidon to facilitate the securing of contracts with potential customers for sale of desalinated water to be produced by the Facility. See id. ¶ 10. Potential customers likely will require that the Permit is final before giving a final commitment to purchase desalinated water from Poseidon. See id. If Poseidon does enter contracts for sale of desalinated water to be produced by the Facility, Poseidon may be unable to adhere to these contracts if the Petition is not resolved timely, potentially exposing it to damages for breach and further prejudice. See id. ¶ 11.

Such prejudice would be an unfair outcome for an entity such as Poseidon, which complied with applicable laws and regulations in obtaining its Permit, and would provide a poor example to other entities in the desalination industry, which likely will need substantial financing and sources of capital to construct necessary infrastructure. Thus, the Regional Board should object to abeyance on the reasonable ground that abeyance would prejudice Poseidon by frustrating Poseidon's financing, potentially hindering construction of the Facility, impeding sale of desalinated water from the Facility, and potentially having a chilling effect on the nascent desalination industry.

IV. CONCLUSION

Multiple reasonable grounds exist for the Regional Board to object to the State Board's holding the Petition in abeyance. First, the Regional Board should assert its plenary water quality authority by objecting to the inference that the Coastal Commission proceedings somehow take precedence over its permitting decision or that the State Board's review of the Petition should be influenced or affected by Coastal Commission proceedings. Second, the Regional Board should object to Petitioners' inference that the Regional Board acted improperly by issuing the Permit based on current law; the Regional Board cannot anticipate future changes in law and should not have review of its permits held in abeyance until future change occurs, as Petitioners would like. Third, the Petition should not be held in abeyance until the Section 316(b) Policy is adopted because Section 316(b) does not affect desalination plants such as the Facility. Fourth, Poseidon's production of about 50 million gallons per day of potable water is supported and encouraged both by state law and by State Board policy. Finally, holding the Petition in abeyance would result in prejudice to Poseidon, which could serve to discourage the nascent desalination industry.

LATHAM & WATKINS LLP

Thus, on any or all of these reasonable grounds, or on other grounds that the Regional Board deems appropriate, the Regional Board should object to Petitioners' request for abeyance of the Petition. We thank the Regional Board for considering our comments and look forward to the Regional Board's response.

Very truly yours,



Emily Taylor
of LATHAM & WATKINS LLP

Attachment

cc: Paul N. Singarella, Esq., Latham & Watkins LLP
Erik Spiess, Esq., State Board
Daniel Cooper, Esq., Lawyers for Clean Water, Inc.

AFFIDAVIT OF ANDREW KINGMAN

I, Andrew Kingman, hereby declare:

1. I am the Chief Executive Officer of Poseidon Resources Corporation ("Poseidon"). I make this declaration based on my own personal knowledge, and if called as a witness, I could and would competently testify thereto.
2. Poseidon was issued a permit ("Permit") by the Santa Ana Regional Water Quality Control Board for discharge from the Seawater Desalination Facility ("Facility").
3. A petition for review ("Petition") of the Permit has been filed with the State Water Resources Control Board ("State Board") and requests that the State Board hold the Petition in abeyance.
4. The State Board has stated that it would be happy to hold the Petition in abeyance for up to two years.
5. The State Board's holding the Petition in abeyance potentially could result in material prejudice to Poseidon, as lack of resolution of the Petition could prevent finality of the Permit.
6. Many aspects of the Facility – including financing, construction, and sale of desalinated water produced by the Facility – may be influenced by resolution of the Petition and finality of the Permit.
7. Poseidon requires resolution of the Petition and finality of the Permit to secure the financing necessary to construct the Facility. Third parties that would finance the Facility typically require that permits are final before releasing any financing. Inability to obtain financing from third parties would prejudice Poseidon by hindering development of the Facility.
8. If Poseidon cannot obtain the necessary financing due to lack of resolution of the Petition and finality of the Permit, Poseidon further could be prejudiced by inability to adhere to its expected construction schedule. Poseidon plans to begin construction of the Facility in 2007. In order for construction to timely begin, Poseidon must enter into contracts with contractors to build

the Facility. Such contractors likely will require that the Petition is resolved and that the Permit is final before they would start work under a contract with Poseidon. Failure of contractors to start work could hinder development of the Facility, prejudicing Poseidon.

9. Poseidon's potential inability to adhere to construction contracts, due to lack of resolution of the Petition and finality of the Permit resulting from inability to obtain financing, potentially would result in the assessment of damages for breach or other damages, such as delay costs, further prejudicing Poseidon.

10. In addition, Poseidon requires the Permit to secure contracts with potential customers for sale of desalinated water produced by the Facility. Potential customers for desalinated water produced by the Facility likely will require that the Permit is in force before they will give a final commitment to purchase desalinated water from Poseidon. Poseidon will be prejudiced if it cannot secure contracts with potential customers, as the purpose of the Facility is to produce desalinated water for sale.

11. Even if Poseidon did enter into contracts for sale of desalinated water produced by the Facility before the Petition is resolved, Poseidon's potential later inability to adhere to these contracts, due to lack of resolution of the Petition and finality of the Permit resulting from inability to obtain financing and consequent inability to construct the Facility, potentially would result in the assessment of damages for breach or other damages, further prejudicing Poseidon.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on November 15, 2006, at Long Beach, CA.



Andrew Kingman